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Miscellaneous—Continued.

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1062

HERMAN C. HANCOCK, JR., PETITIONER

v.

OLIVER H. STOUT, COLONEL, ARMY OF THE UNITED STATES, AS COMMANDING OFFICER OF THE GREENVILLE ARMY AIR BASE, GREENVILLE, SOUTH CAROLINA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 46–53) is reported at 146 F. 2d 741. The opinion of the district court (R. 35–42) is reported at 55 F. Supp. 330.

JURISDICTION

The judgment of the circuit court of appeals was entered December 20, 1944 (R. 53–54). The petition for a writ of certiorari was filed March 20, 1945. The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner, a sergeant in the United States Army, was convicted of rape, in violation of Article 92 of the Articles of War, by a vote of 6 of the 8 participating members of the court-martial, and he was sentenced to life imprisonment by a similar vote. The question is whether Article 43 of the Articles of War requires that a conviction of rape be by a unanimous vote or only by a vote of two-thirds of the participating members of the court-martial.

STATUTE INVOLVED

Articles of War 43 and 92 (Act of June 4, 1920, c. 227, subchapter II, § 1, 41 Stat. 795, 805; 10 U. S. C. 1514, 1564) provide:

> ART. 43. DEATH SENTENCE—WHEN LAWFUL.—No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court-martial present at the time the vote is taken, and for an offense in these articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all of the members present at the time the vote is taken. All other convictions and

sentences, whether by general or special court-martial, may be determined by a two-thirds vote of those members present at the time the vote is taken. All other questions shall be determined by a majority vote.

ART. 92. MURDER—RAPE.—Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; * * *.

STATEMENT

On October 23, 1943, a general court-martial, by a vote of 6 of its 8 participating members, found petitioner, a sergeant in the United States Army, guilty of rape in violation of Article of War 92 and of other offenses in violation of Article of War 96 (R. 14–20, 21–22, 25–26, 27–33).[1] By a separate vote of 6 of the 8 participating members of the court-martial, petitioner was sentenced to confinement at hard labor for life, and to dishonorable discharge and forfeiture of

[1] Article 96 (10 U. S. C. 1568) provides that "all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court." The offenses in violation of Article 96 of which petitioner was found guilty, included two charges of bigamy, three of separate failures to pay debts, three of false statements under oath, one of unlawful sale of an automobile, and one of fraudulently obtaining a loan (R. 15, 17, 18–20, 21–22, 23, 25–26, 27–33).

pay (R. 22, 34).[2] The sentence was approved by the Commanding General, and after review of the record by the Board of Review and by the Judge Advocate General pursuant to Article of War 50½ (10 U. S. C. 1522), who held it legally sufficient to support the sentence, the Commanding General on April 1, 1944, issued an order directing execution of the sentence and designating the United States Penitentiary at Atlanta, Georgia, as the place of confinement (R. 11, 14–23).

On April 14, 1944, petitioner, who was in the custody of respondent pursuant to the sentence, filed a petition for a writ of habeas corpus in the District Court for the Western District of South Carolina, contending that his conviction was illegal

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[2] Article 92, *supra*, p. 3, provides that rape is punishable by death or life imprisonment, as the court-martial shall direct. Under the authority of Article 45 (10 U. S. C. 1516), the President has promulgated a Table of Maximum Punishments in the cases of enlisted men for offenses for which the punishment rests in the discretion of the court-martial (see Manual for Courts-Martial, 1928, p. 95). Under that table and paragraph 104c of the Manual (p. 96), which is applicable to offenses not covered by the table, the total maximum sentence which could be imposed for the offenses in violation of Article 96 of which petitioner was found guilty, is 19 years and 9 months. However, in accordance with military custom that one overall sentence be imposed regardless of the number of offenses upon which conviction is had (See Winthrop, *Military Law and Precedents*, 2d ed., 1920 Reprint, p. 404; *Carter* v. *McClaughry*, 183 U. S. 365, 385–387), no portion of the life sentence imposed upon petitioner was allocated to the offenses in violation of Article 96.

for the reason that under Article of War 43 a conviction for rape required the concurrence of all the members of the court-martial, and that since only three-fourths of the members of the court-martial (6 of the 8 participating) had voted for conviction, he had in fact been acquitted of the rape charge; therefore, petitioner claimed that his sentence to life imprisonment was void (R. 1–6). The writ issued, and a return was filed by respondent, in which he asserted that under Article 43 a unanimous vote of the court-martial was not required to convict petitioner of rape (R. 6–24). After a hearing before the district court (R. 42–43), the court rendered an opinion upholding petitioner's contention (R. 35–42), and entered an order sustaining the writ and directing that petitioner be discharged from respondent's custody, without prejudice, however, to the right of respondent to hold petitioner in custody for the purpose of resentencing him upon the other charges under Article 96 of which he had been legally convicted (R. 42–44). On appeal by respondent to the Circuit Court of Appeals for the Fourth Circuit, the judgment of the district court was reversed (R. 46–54).

ARGUMENT

Petitioner's sole contention (Pet. 2, 10, 13–25), is that under Article of War 43, pp. 2–3, *supra,* an accused cannot be convicted of rape, an offense which under Article 92 may be punished by death

(although not mandatorily so), unless the vote to convict is unanimous. He argues that the first part of Article 43, which reads: "No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court-martial present at the time the vote is taken, and for an offense in these articles expressly made punishable by death; * * *" is to be construed as meaning that in any case in which the death penalty is expressly authorized by the Articles of War, whether that penalty is mandatory or permissive, a conviction cannot be had unless the vote for conviction is unanimous. We submit, however, that the language of the quoted portion of Article 43, particularly when appraised in the light of the historical development of the Article and the consistent administrative construction, is properly to be interpreted to mean that only in the single instance where the death penalty is mandatory [3] is a unanimous vote necessary to convict, and that in every other case, including those cases in which the death penalty is permissive but not mandatory (such as rape, murder, and the other offenses set forth in the margin [4]), the number of votes required for

[3] The only offense for which the death penalty is mandatory is spying in time of war. Article 82, 10 U. S. C. 1554.

[4] In addition to rape and murder, the Articles of War expressly provide that for the following offenses the death

conviction is, as provided in the subsequent portion of Article 43, "two-thirds * * * of those members present at the time the vote is taken."

Preliminarily, it is important to bear in mind, in considering petitioner's contention, (1) that under the "common law military," and except as modified by the Articles of War, all decisions of courts-martial are determined by majority vote (Winthrop, *Military Law and Precedents*, 2d ed., 1920 Reprint, pp. 172, 377, 391),[5] and (2) that in

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penalty may be imposed, but not mandatorily so: Article 58, 10 U. S. C. 1530—desertion in time of war; Article 59, 10 U. S. C. 1531—advising or aiding another to desert in time of war; Article 64, 10 U. S. C. 1536—assaulting or wilfully disobeying a superior officer; Article 66, 10 U. S. C. 1538—mutiny or sedition; Article 67, 10 U. S. C. 1539—failure to suppress mutiny or sedition; Article 75, 10 U. S. C. 1547—misbehavior before the enemy; Article 76, 10 U. S. C. 1548—a subordinate compelling his commander to surrender; Article 77, 10 U. S. C. 1549—improper use of countersign in time of war; Article 78, 10 U. S. C. 1550—forcing a safeguard in time of war; Article 81, 10 U. S. C. 1553—corresponding with or aiding the enemy; Article 86, 10 U. S. C. 1558—misbehavior of a sentinel during time of war.

It is only in the cases of rape and murder that the sole alternative sentence to the death penalty is life imprisonment (see Article 92, p. 3, *supra*). In each of the other cases mentioned, the offender may be sentenced to death or to such other punishment as the court-martial may direct.

[5] In his testimony before a subcommittee of the Senate Committee on Military Affairs in connection with the 1916 revision of the Articles of War (see p. 18, *infra*), General Crowder, then Judge Advocate General, said (S. Rep. 130, 64th Cong., 1st sess., p. 64): "* * * majority verdicts in our court-martial system * * * have * * * rested, not on statute, but on custom. It is our common law mili-

court-martial proceedings the decisions as to guilt or innocence and as to the sentence to be imposed in the event of a decision of guilty, are separate and independent steps (Winthrop, pp. 390–392; see also Pet. 20–21).[6]

That part of Article 43 preceding the semicolon is obviously designed to delimit the authority of courts-martial in cases in which the death penalty must or may be imposed. It provides that where the death penalty is mandatory, the vote both for conviction and sentence must be

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tary. But courts-martial have for all time reached their findings and determined upon a sentence by a majority vote. There has never been any authority of statute law on the subject at all * * *."

[6] The distinction between these two steps is enunciated in the Manual for Courts-Martial, U. S. Army, 1928, corrected to April 20, 1943, pp. 65–66, as follows:

"In the event of conviction of an accused the court will open for the purpose of receiving as evidence such data as to his age, pay, and service as may be shown on the first page of the charge sheet, and of giving the trial judge advocate an opportunity to introduce evidence of the accused's previous convictions by court-martial.

"This evidence and any evidence of the accused's former discharges (79d), and any evidence of former punishment under A. W. 104 (79e), is for consideration by the court in fixing the kind and amount of punishment." (See also R. 33–34.)

The Manual also provides (p. 68) that voting upon a sentence "is obligatory on each member regardless of his vote as to the findings. It is the duty of each member to vote for a proper sentence for the offense or offenses of which the accused has been found guilty, without regard to his opinion or vote as to the guilt or innocence of the accused." (See also Winthrop, p. 392.)

unanimous, and that in other cases a sentence to death may not be imposed except by the concurrence of all the members of the court-martial present at the time the vote upon the sentence is taken. A further limitation upon the authority of a court-martial to impose the death penalty is embodied in the clause, "and for an offense in these articles expressly made punishable by death." The district court was of the opinion (R. 37–38, 39–40), and petitioner so argues, that this clause has the effect of requiring a unanimous vote for *conviction* in any case where the death penalty is authorized, though not mandatory. We submit, however, that this is an improper construction of that portion of the Article of which this clause is merely a part. The clause expresses a limitation which is introduced by the preposition "except," and is conjoined with the requirement of a unanimous vote. Both of these limitations together modify the authority of a court-martial to sentence an accused to death. The requirement of unanimity for conviction in terms applies only to an offense which is mandatorily punishable by death, while the same requirement in respect of the imposition of a death sentence applies not only to such a case, but also to cases in which that penalty is authorized as the maximum punishment. The obvious purpose of the further limitation expressed in the clause, "and for an offense in these articles expressly made punishable by death," is to confine the discretion of courts-martial in im-

posing sentences in cases in which no specific punishment is provided in the Articles of War,[7] and to preclude a court from sentencing to death a person who has been convicted unless the Articles specifically authorize such punishment.

The historical development of the present Article 43 through successive enactments of the Articles of War plainly indicates that this is the sole function of this clause. The British Articles of War of 1765, which were in force in the colonies at the beginning of the Revolution (Winthrop, pp. 931–946), proscribed various military offenses, the punishment for which rested entirely in the discretion of the court-martial,[8] and those articles did not limit the power of a court to impose the death penalty to those crimes for which such punishment was expressly authorized by the articles, the only restriction in this regard being the

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[7] Thus, at present, 28 of the Articles of War provide for punishment "as the court-martial may direct" or "adjudge," or "at the discretion" of the court (see Articles of War 54, 55, 56, 57, 60, 61, 62, 63, 65, 68, 70, 71, 72, 73, 74, 79, 80, 83, 84, 85, 87, 88, 89, 90, 91, 93, 94, 96). Were it not for the clause, "and for an offense in these articles expressly made punishable by death," a court could, theoretically, and unless restrained by executive order (as to which Congress would have no advance notice), adjudge the death penalty for hundreds of offenses (see footnote 9, *infra*, pp. 11–12).

[8] For example, disrespectful utterances against the royal family, absence without leave, persuading desertion, disturbing court-martial proceedings, disorders prejudicial to good order and military discipline (Section II, Article I; Section VI, Articles II, IV; Section XV, Article XVI; Section XX, Article III; Winthrop, pp. 932, 934, 935, 944, 946).

provision of Section XV, Article VIII, that no sentence of death could "be given against any offender by any General Court-martial, unless Nine Officers present shall concur therein: And if there be more than Thirteen, then the Judgment shall pass by the Concurrence of Two-thirds of the Officers present" (Winthrop, p. 943). The first American Articles of War of 1775 (see Winthrop, pp. 953–960), and each succeeding revision of the Articles, including the 1920 Articles now in force, likewise proscribed certain offenses without fixing any punishment therefor, leaving the penalty to be imposed to the discretion of the court-martial.[9] The 1775 Articles did not, as did the British Articles of 1765, require a vote greater than a bare majority to impose the death penalty, but Article LI limited the authority of a court-martial in this regard by providing

[9] For example, the 1775 Articles denounced as military crimes punishable in the discretion of the court-martial such acts as disrespect toward generals, absence without leave, persuading desertion, disturbing court-martial proceedings, and disorders prejudicial to good order and military discipline (Articles IV, VIII, IX, XL, L; Winthrop, pp. 953–954, 956, 957). Similar offenses so punishable in the discretion of the court-martial were proscribed in the Articles of 1776 (Winthrop, pp. 961, 963, 969, 971), 1806 (*id.*, pp. 977, 978, 983, 985), 1874 (*id.*, pp. 987–988, 989, 991), 1916 (39 Stat. 655, 660, 666), and 1920 (Articles 61, 62; 10 U. S. C. 1533, 1534). Furthermore, in the 1874 revision of the Articles, which were incorporated in the Revised Statutes of that year (see p. 14, *infra*), the commission in time of war or insurrection of various crimes (larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with intent to

that "no persons shall be sentenced by a court-martial to suffer death, except in the cases expressly mentioned in the foregoing articles" (Winthrop, p. 957).[10] Since the Articles contained no restriction upon the prevailing rule that decisions of courts-martial be determined by a majority vote, it is clear that the only purpose of this clause was to confine the death penalty to crimes for which those Articles expressly authorized such punishment.

The first limitation in American military law upon the rule of decision of all questions, includ-

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kill, and rape) was made punishable by court-martial without limitation as to the maximum penalty (Rev. Stat. § 1342, Art. 58; Winthrop, p. 990). Article 93 of the 1916 Articles provided that the crimes of manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit any felony, and assault with intent to do bodily harm, "shall be punished as a court-martial may direct" (39 Stat. 664). Article 93 of the 1920 Articles now in force (10 U. S. C. 1565) added to the crimes enumerated in Article 93 of the 1916 Articles, the crimes of housebreaking, forgery, and sodomy as offenses punishable as a court-martial may direct. At present the maximum limits of imprisonment prescribed by the President for enlisted men pursuant to Article 45 of the Articles of War (10 U. S. C. 1516) (see fn. 2, p. 4, *supra*), preclude the imposition of the death penalty against enlisted men convicted of the offenses enumerated in Article 93 (see Manual for Courts-Martial, United States Army, 1928, pp. 95, 99–100).

[10] It may be noted that in the Articles of 1775, the discretion of a court-martial in imposing punishment was further limited in a respect not material herein by the provision of Article LI that no punishment shall "be inflicted at the discretion of a court-martial, other than degrading, cashiering, drumming out of the army, whipping not exceeding thirty-

ing conviction and sentence, by a majority vote, was introduced in the Articles of War of 1776, which, in Section XIV, Article 5, incorporated the substance of the requirement of the British Articles of 1765 (see pp. 10–11, *supra*) by providing that "no sentence of death shall be given against any offender by any general court-martial, unless two-thirds of the officers present shall concur therein" (Winthrop, p. 968).[11] The prohibition

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nine lashes, fine not exceeding two months pay of the offender, imprisonment not exceeding one month." This broad limitation was omitted from subsequent enactments of the Articles of War, beginning with the Articles of 1776. The 1776 and later articles limited the discretionary power of a court-martial to impose punishment by whipping to a certain number of lashes (see Winthrop, pp. 438, 970, 974, 984). Punishment by whipping was abolished in 1861 (Winthrop, p. 438).

[11] The court below was in error in stating that this limitation was first introduced in the Articles of War of 1806 (R. 48). Petitioner's account (Pet. 14–15) of the history of the development of the counterpart of the present Article 43 through the 1874 revision of the Articles is both incomplete and inaccurate. Petitioner states (Pet. 14) that the Articles of 1776 and 1806 contained no "provision as to how many votes are required to convict or sentence" and that the Articles of 1874 "increased the number necessary to sentence to death from that of a simple majority to that of a two-thirds majority" (Pet. 15). As shown in the text, the requirement of a two-thirds vote to impose the death sentence was first introduced in the Articles of 1776 and was carried forward in the Articles of 1786, 1806, and 1874 (see p. 14, *infra*). Petitioner also implies (Pet. 15) that the clause "and in cases herein expressly mentioned" first appeared in the Articles of 1874. This is likewise erroneous, for as we have shown (pp. 11–12), this limitation was first introduced in the Articles of 1775 and was repeated in substance in all subsequent revisions (see pp. 13–14, 15–16, 20–21, *infra*).

against the imposition of the death penalty except in cases in which it was expressly authorized by the Articles, was carried forward in Section XVIII, Article 3 (Winthrop, p. 970). The 1786 revision of the Articles of War likewise incorporated these two limitations in separate articles numbered 8 and 24 (Winthrop, pp. 973, 974).

In the 1806 revision of the Articles, both of these limitations were conjoined in Article 87, as follows: "No person shall be sentenced to suffer death, but by the concurrence of two thirds of the members of a general court martial, nor except in the cases herein expressly mentioned" (2 Stat. 369; Winthrop, p. 984). This provision was carried forward in the Revised Statutes of 1874 as Article 96 and the language was changed slightly to read: "No person shall be sentenced to suffer death, except by the concurrence of two-thirds of the members of a general court-martial, and in the cases herein expressly mentioned" (R. S. § 1342; Winthrop, p. 994).

It is thus clear that up to and including the 1874 revision of the Articles of War, the only limitation upon the existing rule that the questions of conviction and sentence be determined by a majority vote, was the requirement that a two-thirds majority was necessary to sentence an accused to death.[12] And it is equally clear that

[12] Winthrop, in his second edition published in 1896, stated (p. 377):

"Upon the finding [upon the charge and specification], as elsewhere in the proceedings, the result—in all cases, whether

the function of the clause confining the death sentence to offenses for which the Articles expressly authorized such punishment, was solely to limit the discretion of a court-martial in assessing the death penalty to such cases.

The first limitation upon the traditional rule requiring only a majority vote for conviction appeared in the 1916 revision of the Articles of War enacted by the 64th Congress, and the limitation thus imposed applied only to cases in which the death penalty was mandatory. Article 43 of the 1916 Articles provided (39 Stat. 657):

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grave or slight, and whether capital or other—is determined by a majority of the votes. * * *.

"It has sometimes been supposed that a finding of Guilty of an offence for which the death penalty was prescribed must, to be valid, be made by a two-thirds vote, but this is a misconception. The 96th Article of war [1874]—the only law on the subject—simply requires a concurrence of two-thirds of the members to sustain a death *sentence*. In the case of the *finding* a majority governs whatever be the character of the sentence, a bare majority being equally sufficient to sustain a capital sentence as a sentence imposing a slight penalty."

In respect of the vote on the sentence, Winthrop stated (pp. 391–392):

"The question of the selection of the sentence, or of any punishment, like all other questions arising in the procedure of our courts-martial, is, (except in the single instance of the death penalty,) determined by a majority vote. In the excepted case two-thirds of the members present and acting must—as required by Art. 96—concur; *i. e.*, four of a court of five members, five of a court of seven, six of a court of nine, eight of a court of eleven, and nine of a court of thirteen. In all other cases a simple majority is sufficient, as it is necessary, to impose a punishment."

> No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of two-thirds of the members of said court-martial and for an offense in these articles expressly made punishable by death. All other convictions and sentences, whether by general or special court-martial, may be determined by a majority of the members present.

It will be noted that, following the pattern of the earlier revisions of 1806 and 1874, the limitations as to the number of votes required to convict in mandatory death cases and to impose the death penalty in any case, and as to the cases in which the death penalty might be imposed, i. e., offenses expressly made punishable by death, were again conjoined in a single article.

The pertinent legislative data relating to the enactment of the 1916 revision makes it clear that the primary purpose of Article 43 was to extend the protection of the existing requirement of a two-thirds vote for a capital sentence to cases in which the death penalty was mandatory by providing that in the latter cases the vote for conviction must also be by a two-thirds majority. In respect of Article 43 of the 1916 revision, which was first submitted to the 62d Congress in 1912, General Crowder, then Judge Advocate General, explained

this purpose as follows (see S. Rep. 229, 63d Cong., 2d sess., pp. 36–37):[13]

> * * * The article [Article 96 of the 1874 revision], however, leaves it open to a bare majority of the court to find the accused guilty of an offense for which the death sentence is mandatory, so that the article does not, as a matter of fact, furnish any special protection to the accused in a case of this kind, in view of the obvious duty the court has to impose the sentence required by law upon a legal conviction. The corresponding article in the project * * * has been drawn so as to require the concurrence of two-thirds of the members of the court in order to convict an accused person of an offense for which the death penalty is made mandatory by law and also to require the concurrence of two-thirds of the members of the court in passing sentence of death in any case.[14]

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[13] Bills embodying the proposed revision of the Articles had been introduced in the 62d (H. R. 23628 and S. 6550, 2d sess.) and 63d (S. 1032, 2d sess.) Congresses, but they failed of passage. General Crowder's letter submitting the proposed revision to the Secretary of War for submission to the 62d Congress was incorporated and approved in the report of the Senate Committee on Military Affairs of the 63d Congress recommending the enactment of the revision (see S. Rep. 229, 63d Cong., 2d sess., pp. 1, 19–20, 24, 28–37).

[14] Testifying later before the House Committee on Military Affairs of the 62d Congress, General Crowder stated (S. Rep. 229, 63d Cong., 2d sess., pp. 71–72): "In the articles as they now stand a majority of the court may find a man guilty of an offense for which the death sentence is mandatory, and in such a case it is the manifest duty of the court to vote the

General Crowder's testimony before a Senate Subcommittee on Military Affairs of the 64th Congress, is of similar import (S. Rep. 130, 64th Cong., 1st sess., pp. 63–64):

> We come now to the death sentences. * * *
>
> We have in our present code [1874] two offenses—military crimes—for which the death penalty is mandatory. Let us suppose cases of that kind are on trial. The court by a majority verdict can convict the man on trial of a military offense, but the law steps in and says, "You must inflict the death penalty"; so that the law as at present framed does not give the accused any real protection in such cases. * * *
>
> You will note the concluding clause of this article [proposed Article 43] expressly authorizes majority verdicts with the exception noted in this article. * * * There has never been any authority of statute law on the subject at all, and I thought we had better put into this code an express recognition of majority verdicts except in cases where the death penalty is mandatory. * * *[15]

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sentence which the law requires it to adjudge. Unless a two-thirds vote to convict is required, the prisoner is, in such a case, without any real protection." See also the report of the Senate Committee on Military Affairs of the 63d Congress, 2d sess., on S. 1032 (*id.*, p. 21).

[15] In a written statement before this Subcommittee, General Crowder had previously stated as to the proposed article (S. Rep. No. 130, 64th Cong., 1st sess., p. 31):

And, finally, the Senate Committee on Military Affairs of the 64th Congress stated in its favorable report on the proposed revision (S. Rep. 130, 64th Cong., 1st sess., p. 19):

> The revision (new article 43) requires the concurrence of two-thirds of the members of the court-martial to support a finding of guilty of an offense for which the death

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"ART. 43. This article regulates death sentences and corresponds to article 96 of the existing code. Under the terms of this latter article no person can be sentenced to suffer death except by the concurrence of two-thirds of the members of the court, and in cases where such sentence is expressly mentioned. But for one military offense, being a spy, the death sentence is mandatory. Obviously a two-thirds vote should be required to sustain the finding in such a case, and I think it best in all cases that a two-thirds vote should be necessary for a finding of guilty of an offense which the law permits to be punished by death. New article 43 expressly so provides."

There is no explanation available for the last two sentences of General Crowder's statement. Obviously, they are inconsistent with his prior and subsequent statements, and it is patent that the article as quoted above does not contain any such provision which he stated was present. Furthermore, in a statement before a subcommittee of the Senate Committee on Military Affairs of the 66th Congress considering amendments to the Articles of War, General Crowder stated unequivocally that Article 43 of the 1916 revision provided for "the concurrence of two-thirds of the members of the court-martial in finding an accused guilty of an offense for which the death sentence is mandatory." (Hearings before a Subcommittee of the Senate Committee on Military Affairs, 66th Cong., 1st sess., on S. 64 (1919), p. 1295). It seems apparent, therefore, that the isolated statement of General Crowder, quoted above, that a two-thirds majority was necessary for a finding of guilty of an offense for which the death penalty was permissive, was an inadvertence.

> penalty is made mandatory by law. The present code (old article 96) permits a finding of guilty of such offense by a bare majority of the court, though requiring the concurrence of two-thirds of the court in the imposition of the death penalty.

In extending the requirement of a two-thirds vote to conviction of an offense for which the death penalty was mandatory, Congress retained in Article 43 the long established limitation that that punishment could be imposed only "for an offense in these articles expressly made punishable by death" (*supra,* p. 16); but, with the exception referred to in footnote 15, pp. 18–19, *supra,* there is nothing in the legislative history of the 1916 revision to which we have referred to indicate that the retention of this clause, any more than its counterpart in the earlier articles, was designed or intended to enlarge the class of cases in which more than a bare majority vote was necessary to convict.

Article 43 of the 1920 revision of the Articles of War (pp. 2–3, *supra*), which is presently in force, amended Article 43 of the 1916 Articles only by increasing the number of votes required for various decisions: in mandatory death cases both the finding of guilty and the sentence must be by unanimous vote; in cases in which the death penalty is permissive, a sentence to death also requires a unanimous vote; sentences to imprisonment for more than ten years, including life, must be by

a three-fourths vote; and all other convictions and sentences may be determined by a two-thirds vote. As the court below observed (R. 50), "no change whatever was made in the clause relied upon by the [district] court * * * [i. e., the clause limiting the power to impose the death penalty to crimes for which such punishment is expressly authorized] as requiring a unanimous vote to convict of a crime for which the death penalty is permissive." The only change made in this regard was to increase from a bare majority to two-thirds the number of votes necessary for a finding of guilty of any offense other than a crime which is mandatorily punishable by death.

The historical development of Article 43 thus plainly shows, we submit, that the sole function of the clause, "and for an offense in these articles expressly made punishable by death" (without which there could be no question but that a two-thirds majority is sufficient for a determination of guilty in all cases except those in which the death penalty is mandatory), is, as the court below so aptly stated (R. 48), "to make clear that the death penalty may not be imposed by a court-martial except for an offense expressly made punishable by death in the articles of war, and thus to preclude the possibility of the imposition of the death penalty for offenses where the punishment is left in the discretion of the court-martial." [16]

[16] See footnote 7, p. 10, *supra*.

This construction of Article 43 has consistently been followed by the executive department charged with its administration. Pursuant to the authority of Article 38 of the 1916 Articles (39 Stat. 656), the President issued regulations as to procedure in cases before courts-martial, which were embodied in the 1917 edition of the Manual for Courts-Martial, United States Army. It was there stated: "Where the death penalty is not mandatory but is discretionary a conviction may be determined by a majority vote, but two-thirds of the members must concur in the death penalty before it can be imposed" (p. 141; see also, p. 160); and, further, that "Courts-martial have no power to impose the death penalty, except for offenses expressly made punishable by death by the Articles of War" (p. 160). Since Article 43 of the 1916 Articles had been interpreted in the 1917 edition of the Manual, notwithstanding the clause, "and for an offense in these articles expressly made punishable by death," to permit conviction by a majority vote in cases where the death penalty was permissive, although a two-thirds vote was required to impose the death sentence in such cases and to convict where the death sentence was mandatory, it is hardly likely, as the court below stated, that in the 1920 revision of Article 43 "Congress would have left it unchanged if the purpose of the clause had been to require the same vote [for conviction] in cases

where the death sentence was merely permissive as in those where it was mandatory" (R. 50–51).

Following the enactment of the 1920 revision of the Articles of War, the 1921 edition of the Manual for Courts-Martial, in accord with the changes embodied in Article 43, stated that "where the death penalty is not mandatory but is discretionary a conviction may be determined by a two-thirds vote, but all of the members present at the time the vote is taken must concur in the death penalty before it can be imposed"; it also reiterated the caveat that the death sentence could not be imposed unless it is expressly authorized by the Articles of War for the particular crime of which the accused had been found guilty (pp. 237–238, 273–274). The 1928 edition of the Manual, as corrected to April 20, 1943, which is presently in force, repeats the caveat that the death penalty cannot be imposed except for offenses expressly made so punishable by the Articles of War (p. 92), and while in respect of the number of votes required for conviction and sentence, this edition merely refers to Article 43 (pp. 65, 68), it in effect reaffirms the provisions of the 1921 edition to which we have referred, but which are not repeated in terms in the 1928 edition.[17]

[17] The introduction to the 1928 edition (p. VII) states that although some portions of the 1921 edition had been omitted, "it does not follow that any such omitted portion may not apply to a given case, unless, of course, its provisions have been changed by this manual."

Petitioner attempts to overcome this settled construction of Article 43 in respect of the number of votes required for conviction in cases where the death penalty is permissive but not mandatory, by asserting that it leads to unreasonable and inconsistent results. He claims (Pet. 18) that it is unreasonable to believe that Congress would permit conviction by a two-thirds vote for an offense which may result in the imposition of the death penalty (upon a unanimous vote therefor), and at the same time require that a three-fourths majority is necessary to impose a sentence to life imprisonment. Petitioner's argument in this regard is unavailing to him, since he was in fact both convicted and sentenced to life imprisonment by three-fourths votes of the court-martial. In any event, the situation he envisages is analogous to that which existed from 1775 to 1916, a period during which in all cases, including mandatory and permissive death cases, only a bare majority vote was required to convict, but a two-thirds vote was necessary to impose the death penalty. The fact that the situation did exist shows that it was not thought unreasonable to permit a conviction in a death case by a lesser number of votes than was required to inflict the death penalty, and that sufficient protection was afforded by the requirement at that time of a two-thirds vote for a sentence to death.

Petitioner also asserts (Pet. 18–19) that under the construction urged by the Government it

would be possible in a rape case that no punishment could be inflicted. He argues that since there are only two possible penalties for that crime, i. e., death or life imprisonment (see Article 92, p. 3, *supra*), if an offender is convicted by a two-thirds vote, those members of the court-martial who voted to acquit would not be willing to vote for life imprisonment (or the death penalty), with the result that no punishment would be possible. Here again, it must be noted that petitioner was convicted by a three-fourths vote, the same number as is required to impose a sentence of life imprisonment. Moreover, this argument ignores the settled rule that it is the duty of each member of a court-martial to vote upon the sentence to be imposed upon a convicted accused, regardless of how he had voted on the question of guilt (see fn. 6, p. 8, *supra*).

Finally, petitioner argues (Pet. 19–22), somewhat inconsistently, that because of the rule requiring each member of a court-martial who voted against conviction nevertheless to vote upon a sentence, in a rape case, where the only permissible sentences are death or life imprisonment, a sentence of life imprisonment may in effect be determined by a mere two-thirds vote, in contravention of the statutory requirement that a three-fourths majority is necessary to impose a life sentence; or, in other words, that this latter requirement is vitiated by the construction per-

mitting conviction in such a case by a two-thirds vote. It is true that in a rape case a conviction by a two-thirds vote must result in the imposition of at least a life sentence. But, again, this hypothetical situation suggested by petitioner is comparable to that which existed from 1776 to 1916, when a bare majority vote was sufficient to convict in cases in which the death penalty was mandatory, although a two-thirds majority was necessary to impose such punishment. This situation was remedied by the revision of Article 43 in 1916 to require that in such a case a two-thirds vote was necessary both to convict and sentence. The remedy for the possible anomaly suggested by petitioner is likewise to be sought in Congress and not in the courts. Cf. *United States* v. *Cooper Corp.*, 312 U. S. 600, 605; *Commissioner of Immigration* v. *Gottlieb*, 265 U. S. 310, 313.

This seeming inconsistency suggested by petitioner could in any event arise only in cases of murder and rape, in which alone the punishment is either death or life imprisonment. No such difficulty could arise with respect to the numerous crimes in which the punishment provided is death or such other punishment as the court-martial may direct (see fn. 4, pp. 6–7, *supra*). In such cases, a two-thirds vote for conviction does not obviously force the court-martial to impose a sentence of at least life imprisonment. Furthermore, as stated by the circuit court of appeals,

"to require the unanimous vote of the court-martial for conviction of all the violations of military law for which the death penalty, while permissive, is seldom, if ever, imposed, would greatly hamper the army in maintaining discipline in war time" (R. 53);[18] and we submit that the court below was clearly correct in holding that "Congress clearly intended no such thing" (R. 53).

Petitioner was both convicted and sentenced to life imprisonment by a vote of 6 of the 8 members of the court-martial present when the votes were taken. He was, consequently, properly convicted by more than the two-thirds majority prescribed by Article 43, and he was sentenced by a vote of three-fourths of the members of the court-martial, as required by that article for such a sentence.

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[18] Compare General Crowder's testimony in 1912 in connection with the proposal to revise Article 96 of the 1874 articles so that a two-thirds vote would be necessary both to convict and to sentence in mandatory death penalty cases. Responding to the question why a unanimous verdict should not be required, General Crowder stated (S. Rep. 229, 63d Cong., 2d sess., p. 72): "To require a unanimous vote for the infliction of the death penalty in time of war would be going a long way * * * toward impairing the success of the field operations of an army."

The Office of the Judge Advocate General advises that it estimates that in respect of purely military offenses, courts-martial since Pearl Harbor have assessed the death penalty in less than a dozen cases; in only one instance, involving desertion in the face of the enemy on two occasions, was the death sentence confirmed and executed.

CONCLUSION

While the question presented by this case is one of first impression in the civil courts,[19] we believe that it was correctly decided below and that, there being no conflict of decisions, there is therefore no occasion for further review by this Court. Accordingly, we respectfully submit that the petition for a writ of certiorari should be denied.

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APRIL, 1945.

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[19] The decision of the circuit court of appeals was followed in *Hurse* v. *Caffey*, decided by the District Court for the Northern District of Texas on March 13, 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945